Supreme Court, U.S.
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No. 95-1917

In the Supreme Court of the United States

OCTOBER TERM, 1995

JACK RANDELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, when administrative adjustments to partnership items are made under the unified audit provisions of the Internal Revenue Code (26 U.S.C. 6221-6223) and are not challenged by a timely petition for readjusment, a suit to enjoin the assessment and collection of the resulting income tax deficiencies of an individual partner is barred by the Anti-Injunction Act, 26 U.S.C. 7421(a).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 64 F.3d 101. Two opinions of the district court (Pet. App. 20a-35a, 47a-49a) are unreported, and a third opinion (Pet. App. 36a-46a) is reported at 94-2 U.S.T.C. (CCH) ¶ 50,362.

JURISDICTION

The judgment of the court of appeals was entered on August 28, 1995. The petition for rehearing was denied on February 26, 1996. The petition for a writ of certiorari was filed on May 28, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

1. a. In 1983, petitioner was a limited partner in Government Arbitrage Trading Company ("GATC"), a partnership with more than 100 partners. On its partnership return for 1983, GATC reported partnership income of $4,224,972, expenses of $56,475,053, short-term capital loss of $49,412 and long-term capital loss of $74,117 (Pet. App. 5a). GATC issued a Schedule K-1 for 1983 that reported petitioner's share of the ordinary expenses as $821,350, his share of the short-term capital loss as $777 and his share of the long-term capital loss as $1,165 (*id.* at 22a). Petitioner did not file an individual tax return for that year (*id.* at 5a).

Upon auditing GATC for 1983, the Internal Revenue Service disallowed all of GATC's claimed expenses and short-term capital loss. These adjustments increased the partnership income that was taxable on the partners' individual returns. On October 24, 1991, the Service issued a Final Partnership Administrative Adjustment ("FPAA") reflecting these adjustments. On November 18, 1991, copies of the FPAA were sent to GATC's notice partners, including petitioner. One of the partners filed a petition seeking readjustment of the partnership items in Tax Court, but the petition was dismissed because it was untimely. *Government Arbitrage Trading Co.* v. *Commissioner*, 67 T.C.M. (CCH) 2551 (1994).

b. During the years 1985-1987, petitioner was also a limited partner in Conarbco, a partnership with more than 100 partners. Petitioner failed to file individual tax returns for 1985 and 1986. He filed an untimely individual return for 1987 reporting his

distributive share of income from Conarbco for that year (Pet. App. 6a).

Upon auditing Conarbco, the Service (i) disallowed claimed expenses of $57,369,574 for 1985, (ii) disallowed claimed expenses of $61,587,165 and a long-term capital loss of $278,023 for 1986 and (iii) disallowed claimed expenses of $9,584,515, a long-term capital loss of $435,257 and a short-term capital loss of $295,464 for 1987. These adjustments increased the partnership income that was taxable on the partners' individual returns (Pet. App. 7a).

On August 30, 1991, the IRS issued an FPAA for Conarbco. On September 17, 1991, copies of the FPAA were sent to Conarbco's notice partners, including petitioner. Neither petitioner nor any other partner of Conarbco filed a petition for readjustment of the partnership items in any court (Pet. App. 7a).

2. After the administrative adjustments to the partnership items of GATC and Conarbco became final, the Service assessed petitioner for the taxes due on his distributive share of the adjusted income of those partnerships (Pet. App. 8a). Petitioner then commenced this action in federal district court to obtain an injunction against the collection of the taxes. Petitioner sought to rely on the exception to the Anti-Injunction Act, 26 U.S.C. 7421(a), that permits a court to enjoin the assessment and collection of taxes when the Service has not issued a required notice of deficiency. See 26 U.S.C. 6213(a).

The district court granted summary judgment to the government. The court noted that, under Sections 6230(a)(1) and 6231(a)(6) of the Code, a notice of deficiency is *not* required prior to the assessment of taxes that result from final administrative adjustments to partnership items. Because a notice of

deficiency is not required in the context of this case, the court concluded that the exception from the Anti-Injunction Act on which petitioner relies is inapplicable (Pet. App. 29a-30a, 34a, 37a, 48a).

3. The court of appeals affirmed (Pet. App. 1a-17a). The court noted that, in enacting the Tax Treatment of Partnership Items Act of 1982, as Title IV of the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA") (codified at 26 U.S.C. 6221 *et seq.*), Congress created a single, unified procedure for determining the tax treatment of partnership items at the partnership level (Pet. App. 3a-5a). Under this unified audit procedure, a notice of deficiency is not required prior to the assessment of a tax that results from a "computational adjustment" (26 U.S.C. 6230(a)(1))—a term of art that is defined to mean "the change in the tax liability of a partner which properly reflects the treatment * * * of a partnership item" (26 U.S.C. 6231(a)(6)).

The court rejected petitioner's contention that the assessments in this case were not the result of a "computational adjustment" as defined in Section 6231(a)(6). The court noted that the final administrative adjustments had determined "the treatment * * * of a partnership item" and therefore fell squarely within the statutory definition of "computational adjustment." The court declined to consider petitioner's contention that the final administrative adjustments were in error because, under the provisions of TEFRA, "we are precluded * * * from examining a partnership item in an individual partner's proceeding" (Pet. App. 12a).

The court also rejected petitioner's claim that summary judgment was inappropriate on the question whether petitioner was, in fact, a partner of the two

partnerships during the years at issue. The court noted that "[t]he government's proof of Randell's partnership status was the Schedules K-1 issued by GATC and Conarbco to Randell, identifying him as a partner," and that petitioner's unsupported assertion that he "may have submitted letters of resignation" from the partnerships was inadequate to demonstrate a genuine issue of material fact (Pet. App. 14a-16a). The court concluded that summary judgment on this issue was therefore appropriate (*ibid.*).[1]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. A district court may enjoin the assessment and collection of a tax for which a notice of deficiency is required but has not been issued. 26 U.S.C. 6213(a). Petitioner errs, however, in contending (Pet. 10-16) that a notice of deficiency was required prior to the assessment and collection of the tax involved in this case.

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[1] The court also rejected petitioner's contention that the assessments were not "computational adjustments" because they were made discriminatorily against him and not equally against other partners. The court explained that the assessments were not identical among all of the partners because some partners had reported the amount of income and expenses claimed by the partnerships on their informational returns while petitioner had failed to file *any* returns for three of the years. The difference in the underlying individual returns explained the difference in the amount of adjustment required to determine each partner's proper tax (Pet. App. 16a).

Prior to 1982, adjustments to a partnership's items of income, gain, loss, deduction, or credit were made at each individual partner's level rather than at the partnership level. This resulted in multiple administrative and judicial proceedings that sometimes yielded inconsistent results among partners of the same partnership. See *Maxwell* v. *Commissioner*, 87 T.C. 783, 787 (1986). To remedy this problem, Congress enacted Sections 6221-6233 of the Internal Revenue Code to establish a single, unified procedure for determining the tax treatment of all partnership items at the partnership level. A "partnership item" is an item that "is more appropriately determined at the partnership level than at the partner level" (26 U.S.C. 6231(a)(3)); the term includes "[t]he partnership aggregate and each partner's share of * * * [i]tems of income, gain, loss, deduction, or credit of the partnership" (26 C.F.R. 301.6231(a)(3)-1(a)(i)). A "nonpartnership item" is one that is "not a partnership item" (26 U.S.C. 6231(a)(4)) and is therefore to be determined at the individual partner's level. Assessments of tax based on *non*partnership item adjustments are subject to the statutory notice of deficiency procedures, but assessments reflecting adjustments to "partnership items" are not subject to those procedures. 26 U.S.C. 6212(a), 6230(a)(2).

A partner generally will file an individual income tax return that is consistent with the partnership return. A partner who disagrees with the reporting of his or her distributive share of partnership items by the partnership must either (i) notify the Service of an election to treat a partnership item inconsistently with the treatment of the item on the partnership return (26 U.S.C. 6222(b)) or (ii) request an administrative adjustment of the partnership item

(26 U.S.C. 6227(a)). In the absence of such an election or request for adjustment, a partner who treats items inconsistently with the partnership's treatment of items (including a partner who does not file an individual return reporting his distributive share of the partnership's income) may be assessed a deficiency in tax as a "computational adjustment," without the prior issuance of a notice of deficiency. 26 U.S.C. 6222(c), 6230(a)(1). A "computational adjustment" is defined as a "change in the tax liability of a partner which properly reflects the treatment * * * of a partnership item." 26 U.S.C. 6231(a)(6). Without issuing a notice of deficiency, the Service may thus assess a partner for the tax that results when the partner's treatment of a partnership item is conformed with the proper treatment of that item as determined in the partnership proceeding.

The Service mails notice of any administrative proceeding to adjust a partnership item to the "tax matters partner" who is designated by the partnership to handle tax matters (26 U.S.C. 6231(a)(7)). Notice of the final partnership administrative adjustment is also sent to the tax matters partner and to each "notice partner." 26 U.S.C. 6223(a), 6223(b), 6231(a)(8). For any partnership with 100 or more partners, a "notice partner" is generally one who—like petitioner—owns at least a one percent interest in the partnership. 26 U.S.C. 6223(b)(1).

The tax matters partner may contest the FPAA within 90 days after its mailing by filing a petition for readjustment in Tax Court, the Court of Federal Claims or the appropriate federal district court. 26 U.S.C. 6226(a). If no petition is filed, any notice partner may file a petition for readjustment within the next 60 days. 26 U.S.C. 6226(b)(1). All partners

with an interest in the outcome of the proceeding are entitled to participate in an action commenced by either the tax matters partner or a notice partner. 26 U.S.C. 6226(c), 6226(d).

After the FPAA adjustments become final, the Service may—without further notice—assess partners for their distributive share of the adjusted partnership items, as a computational adjustment. 26 U.S.C. 6225, 6230(a). A statutory notice of deficiency is not required because the partnership item has been resolved at the partnership level and cannot be contested at the individual partner level. 26 U.S.C. 6221, 6230(a).

2. Petitioner acknowledges (Pet. 12) that a notice of deficiency is not required if this case involves a "computational adjustment" within the meaning of Sections 6230(a) and 6231(a)(6) of the Code. He asserts, however, that the assessments made against him do not constitute computational adjustments because the assessments do not "properly reflect[] the treatment * * * of a partnership item" (Pet. 12). Petitioner's contention is premised on the assumption that the FPAA was wrong in failing to determine that all income of the partnerships, as well as all expenses of the partnerships, should not be recognized. Petitioner's theory is that, in determining that the expenses reported by the partnerships were to be disallowed because they were based upon sham transactions, the Service should also necessarily have determined that the income of the partnerships should also not be recognized (*id.* at 12-13).

The court of appeals correctly noted, however, that petitioner's contention lacks factual substantiation (Pet. App. 12a). The final administrative partnership

adjustments determined only that the expenses claimed by the partnerships on their returns were not properly allowable; the Service did not also determine that the gross income reported by the partnerships did not exist (C.A. Joint Appendix 116-117, 129-130). Each of the notice partners, including petitioner, had the opportunity to contest these administrative adjustments by filing a petition for readjustment.[2] But no partner, including petitioner, pursued that prescribed procedure. Petitioner's attempt to obtain review of the final administrative partnership adjustments by enjoining the resulting assessments is not permitted under the Anti-Injunction Act because the resulting "computational adjustments" do not require issuance of a notice of deficiency. See pages 5-8, *supra*. As the court of appeals correctly concluded, "GATC's 1983 income and Conarbco's 1985,

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[2] If petitioner had filed a petition for readjustment, he could have raised the same issues relating to the final administrative adjustment that he seeks to raise in this injunctive case. He failed, however, to pursue the statutory remedy that Congress prescribed. Petitioner's assertion (Pet. 16a) that he had no reason to file a petition for readjustment because he had not claimed his distributive share of the net losses reported by the partnerships (that the Service disallowed) is disingenuous. Petitioner received copies of the K-1s that the partnership issued identifying him as a partner; he also received the FPAAs issued by the Service. Because the partnerships had reported on their returns that they had realized gross income during the years in issue, the disallowance of all of the partnerships' claimed deductions transformed the net losses reported by the partnerships into net gains, taxable proportionately to each individual partner. Petitioner had ample reason to file a petition for readjustment if, as he now contends, it was his position that the partnerships did not earn any taxable income.

1986, and 1987 income may not be revisited in this litigation" (Pet. App. 13a).

Because no valid petition for readjustment was filed in response to the issuance of the FPAA, the partnership items adjusted administratively by the Service are now conclusively established. See *Sente Investment Club Partnership* v. *Commissioner*, 95 T.C. 243, 249 (1990); *Genesis Oil & Gas, Ltd.* v. *Commissioner*, 93 T.C. 562, 565 (1989). Under the unified audit procedures that Congress has enacted, courts lack jurisdiction to review final adjustments of partnership items in any individual partner's personal case. *Sente Investment Club Partnership* v. *Commissioner*, 95 T.C. at 249; *Genesis Oil & Gas, Ltd.* v. *Commissioner*, 93 T.C. at 565; *Trost* v. *Commissioner*, 95 T.C. 560, 563 (1990); *Maxwell* v. *Commissioner*, 87 T.C. 783, 788 (1986); *Palmer* v. *Commissioner*, 63 T.C.M. (CCH) 3162, 3164 (1992), aff'd, 4 F.3d 1000 (11th Cir. 1993) (Table).

The courts below correctly held that, in ascertaining whether the assessments were based upon "computational adjustments," the relevant inquiry is whether the assessments are imposed on the appropriate ownership percentage of the partnerships' income *as adjusted by the final administrative adjustments* (Pet. App. 13a-14a). No decision of any other court is to the contrary.

3. Petitioner asserts that the district court erred in awarding summary judgment because a material issue of fact exists as to whether petitioner remained a partner in GATC and Conarbco during the years in

issue.[3] The affidavit on which petitioner relies (Pet. 19), however, states only (C.A. Jt. App. 408):

> I did pay money to become a partner in certain tax shelter partnerships. I do not recall their names. I do recall writing letters informing some or all of these partnerships that I resign as a partner. I believe that I wrote these letters in 1983 or 1984.

As the court of appeals noted (Pet. App. 15a), this affidavit was submitted after the cross motions for summary judgment were initially decided and without leave of court as required by Civil Rule 3(j) of the Local Rules of the Southern District of New York. Moreover, as the court of appeals concluded, "no specific facts were timely alleged * * * to dispute the proof submitted by the government and no genuine issue of material fact existed as to [petitioner's] status as a partner in GATC and Conarbco" (Pet. App. 16a). Further review of this factual determination, concurred in by both courts below, is not warranted. See *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317-318 n.5 (1985).

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[3] For the reasons stated by the court of appeals (see note 1, *supra*), petitioner also errs in contending (Pet. 17-18) that the final administrative adjustments were applied to him in a discriminatory manner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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